BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Requests of U S West Communications, Inc.	)	**CC Docket No. 97-90**
For Interconnection Cost Adjustment	)	**CCB/CPD 97-12**
Mechanisms	)	

TO: The Commission

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Competitive Telecommunications Association ("CompTel") supports the request by three competitive local exchange carriers for a declaratory ruling that U S West's proposed Interconnection Cost Adjustment Mechanism ("ICAM") surcharge violates the Telecommunications Act of 1996 ("1996 Act"), and that the FCC will preempt any state action authorizing or approving the ICAM surcharge.

It is imperative that the FCC grant the requested declaratory ruling expeditiously. U S West has stated that it plans to use the ICAM surcharge to recover all historical, embedded "costs" that it cannot recover through rates for interconnection, network elements and local exchange resale. If permitted to do so, U S West would undermine the entire regime of local competition designed by the Commission in the 1996 Act.

The proposed ICAM surcharge would squarely violate the pricing rules established by Congress in Section 252(d). It would impose non-cost based charges upon the rates paid by carriers purchasing interconnection and network elements, and it would contradict the avoided-cost methodology applicable to local exchange resale. There is no statutory basis for U S West to impose a state-authorized ICAM surcharge to recover the alleged "costs" it will incur to comply with the 1996 Act.

Further, U S West is wrong when it asserts that rates derived according to statutory criteria will not compensate it for the costs it may incur to comply with the statute. For interconnection and network elements, the forward-looking long-run incremental cost standard adopted by the FCC and numerous state commissions takes all relevant economic cost considerations into account.

The FCC has at least three sources of statutory authority to preempt state action approving the proposed ICAM surcharge. First, Section 253 of the 1996 Act requires the

FCC to preempt any state or local law that prohibits, or has the effect of prohibiting, carriers from providing any interstate or intrastate telecommunications service. The ICAM surcharge would create a high barrier to entry into the local markets in U S West's region, and it must be preempted. The ICAM surcharge does not constitute the type of competitively-neutral mechanism for promoting universal service that Congress put beyond the FCC's preemption power.

Second, the ICAM surcharge is indisputably in violation of the plain terms of the Communications Act of 1934, as amended by the 1996 Act. Wholly apart from the question whether the ICAM surcharge is an entry barrier that must be preempted under Section 253, that surcharge should be preempted by the FCC as contrary to federal statute.

Third, the ICAM surcharge, as described and justified by U S West, is plainly beyond the authority granted by Congress to states regarding the recovery of the "costs" of complying with the 1996 Act. Section 252 sets forth the full extent of state authority to set rates for interconnection, network elements, and local exchange resale, and that provision applies only to negotiated or arbitrated agreements. States have no authority to establish mechanisms outside of such agreements for the recovery of compliance "costs," and the FCC should preempt any state actions premised upon such nonexistent authority.

Lastly, it is clear from U S West's description of the ICAM surcharge that it would recover certain costs associated with the provision of interstate access services. The FCC has plenary and exclusive jurisdiction over interstate services, and it should preempt the attempted recovery of interstate access "costs" through a state-authorized surcharge.

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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"),[1] by its attorneys, hereby submits these comments in support of the "Petition for Declaratory Ruling and Contingent Petition for Preemption" [hereinafter "Petition"] submitted by Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., and NEXTLINK Communications, L.L.C. [hereinafter "petitioners"] on February 20, 1997 in the above-captioned proceedings. As the petitioners document, U S West Communications, Inc. ("U S West") has asked state commissions in its region for authority to impose a so-called Interconnection Cost Adjustment Mechanism ("ICAM") surcharge upon competitive local exchange carriers ("CLECs") or end-user subscribers. For the reasons stated in the Petition, as well as those specified below, CompTel strongly agrees that the Commission should declare the proposed ICAM surcharge to be in violation of the Communications Act of 1934, as amended, and that any state action approving or authorizing such a surcharge will be subject to preemption by the Commission pursuant to constitutional and statutory authority.

CompTel urges the Commission to act expeditiously in granting the Petition. If authorized to impose an ICAM surcharge upon new entrants, U S West will use that

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[1] CompTel is an industry association whose membership includes more than 200 providers of competitive telecommunications services.

authority to undermine the entire regime of local competition designed by Congress in the Telecommunications Act of 1996 ("1996 Act"). While U S West claims that it seeks to recover only the "extraordinary, one-time or start-up" costs of complying with the 1996 Act, in fact U S West plans to recover as much as $1 billion from new entrants over three years.[2] Further, there is nothing in its underlying rationale that would prevent U S West from seeking to impose a broader surcharge to recover any other "costs" that it believes have fallen outside the pricing rules mandated by Congress. In what is perhaps U S West's most chilling statement, it notes:

> "[we] fully expect[] to identify and include other interconnection costs as the requirements for network rearrangements become more clear. [We] reserve the right to add additional cost categories to ICAM in the quarterly filings."[3]

U S West adds that it proposes the ICAM to "recover the totality of such costs which are not recovered by charges to CLECs in negotiated or arbitrated agreements."[4] The ICAM surcharge is the camel's nose under the tent; U S West plainly intends to use the surcharge to recover all historical, embedded "costs" that it feels are not fully recovered by the pricing rules established by Congress for interconnection, network elements and local exchange resale under the 1996 Act. The Commission must act now to preserve the statutory framework and avoid time-consuming and expensive litigation in response to future actions by U S West to expand the loophole it hopes to create here.

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[2] See "Petition for Declaratory Ruling and Request for Agency Action," filed by U S West Communications, Inc., Before the Public Service Commission of Utah, Docket No. 97-049, at pp. 3, 4 (Exhibit A to Petition) [hereinafter "U S West Petition"].

[3] Id. at p. 9.

[4] Id. at p. 5.

I. THE PROPOSED ICAM SURCHARGE VIOLATES THE PRICING RULES IN SECTIONS 251 AND 252 FOR INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND LOCAL EXCHANGE RESALE

U S West alleges that the proposed ICAM surcharge is necessary to compensate it for certain one-time "costs" of complying with the Telecommunications Act of 1996 ("1996 Act") which will not be included in or recovered from the rates it charges for interconnection, network elements, or local exchange resale under Section 251(c). Even if that allegation can be accepted at face value (which CompTel challenges below), the petitioners correctly note that it squarely contradicts the statutory language requiring incumbent local exchange carriers ("ILECs") to provide interconnection and unbundled network elements at "cost." 47 U.S.C. § 252(d)(1)(A).[5] In its Interconnection Order, the Commission correctly interpreted those provisions to prohibit imposing any non-cost based charges in the rates for elements and services pursuant to Sections 251 and 252.[6] Therefore, to the extent U S West is correct that the statutory pricing rules do not permit it to recover fully its costs of complying with the 1996 Act, state commissions are powerless to supplant those rules through the ICAM surcharge.

Similarly, U S West concedes that some of the revenues to be obtained through the ICAM surcharge reflect functions that U S West will perform for carriers

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[5] See Petition at 5-10.

[6] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, rel. Aug. 8, 1996, at ¶ 713 (prohibiting the inclusion of universal service subsidies in the rates for "elements and services pursuant to sections 251 and 252") [hereinafter "Interconnection Order"]; id. at ¶ 363 & n.772 (prohibiting the imposition of intrastate or interstate access charges upon carriers purchasing unbundled network elements).

purchasing local exchange resale pursuant to Section 251(c)(4).[7] Once again, the statute establishes a pricing rule that leaves no room for U S West to recover additional revenues through an ICAM surcharge. Sections 251(c)(4) and 252(d)(3) provide that U S West must charge a "wholesale rate[]" for local exchange service reflecting the retail rate minus all marketing and other "avoided" retail costs. 47 U.S.C. §§ 251(c)(4) & 252(d)(3). As the FCC noted in the Interconnection Order, "[a]n avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in section 252(d)(3)."[8] Neither U S West nor state commissions have the authority to modify the statutory pricing rule through the imposition of ICAM surcharges upon new local entrants purchasing local exchange services at wholesale rates.

Lastly, CompTel disagrees with U S West's view that the rates it charges for interconnection, network elements and local exchange resale pursuant to the statutory pricing rules do not already include the costs that U S West may incur to comply with the 1996 Act. As regards interconnection and network elements, the FCC implemented the statutory pricing rule by adopting a forward-looking, long-run incremental cost standard. The FCC defined the term "incremental costs" to include "the additional costs . . . that a firm will incur as a result of expanding the output of a good or service by producing an additional quantity of the good or service."[9] Further, the FCC noted that "[t]he term 'long run,' in the context of 'long run incremental cost,' refers to a period long enough so that all of a firm's costs

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7 See U S West Petition at pp. 4, 6-7.

8 Interconnection Order at ¶ 914.

9 Id. at ¶ 675.

become variable or avoidable."[10] Numerous state commissions have adopted a similar methodology for interconnection and network elements. If the revenues U S West seeks to obtain through the ICAM surcharge can legitimately be characterized as the "costs" of furnishing interconnection or network elements, then a cost-based rate under the statutory pricing rule will fully compensate U S West. If those revenues cannot legitimately be characterized as interconnection or network element "costs," then U S West is not entitled to impose them upon carriers purchasing interconnection or network elements.

II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT IT WILL PREEMPT ANY STATE ACTION AUTHORIZING U S WEST TO IMPLEMENT THE PROPOSED ICAM SURCHARGE

The Commission has at least three sources of statutory authority to preempt any state action authorizing U S West to impose the ICAM surcharge upon new entrants.

A. Section 253.

The petitioners correctly note that the ICAM surcharge is precisely the type of entry barrier that Congress sought to prohibit when it adopted the 1996 Act.[11] As a proposed charge upon new entrants, the ICAM surcharge is, in effect, a billion dollar tribute to the existing local exchange monopoly carrier from new entrants. As a proposed charge upon end-user subscribers, U S West is seeking to obtain more than full compensation as prescribed by the pricing rules established by Congress, thereby creating a war chest that U S West can use to oppose new entry and, to the extent U S West obtains approval to enter

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10 Id. at ¶ 677.

11 See Petition at 10-13.

the in-region interLATA market, subvert the emerging market for full-service offerings. As a matter of design and effect, the ICAM surcharge would perpetuate U S West's local monopoly, deter new local entry, and undermine potential future full-service competition.

Sections 253(a) and (d) require the Commission to preempt the enforcement of any state or local legal requirements that "prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[12] While several provisions in the 1996 Act authorize states to adopt telecommunications regulations, those provisions provide that such actions must be consistent with other statutory provisions.[13] Therefore, the Commission should grant the requested declaratory ruling that it will preempt any state actions authorizing U S West to impose the proposed ICAM surcharge in violation of the 1996 Act, whether that surcharge is imposed upon end-user subscribers or upon carriers seeking to purchase interconnection, network elements or local exchange service pursuant to Section 251.

The proposed ICAM surcharge cannot be justified under Section 253(b) as a necessary, "competitively neutral" mechanism to promote universal service, protect the public welfare and safety, ensure the continued quality of service, or safeguard consumer rights. The surcharge plainly is not "competitively neutral." It would benefit U S West at the expense of local competition if imposed directly upon new entrants; it would provide U S West with a war chest to undermine emerging local competition and potential future full-

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[12] See 47 U.S.C. §§ 253(a), (d).

[13] See, e.g., 47 U.S.C. § 261(b) (providing that state and local authorities to may not implement any laws, policies or regulations that are inconsistent with the 1996 Act); 47 U.S.C. § 251(d)(3) (authorizing states to establish "access and interconnection obligations of local exchange carriers" provided that such obligations are "consistent with the requirements of [Section 251]").

service competition if imposed upon end-user subscribers. Further, the surcharge cannot be defended as necessary to preserve universal service. Section 254(f) provides that states may adopt regulations that require "[e]very [intrastate] telecommunications carrier" to contribute on "an equitable and nondiscriminatory basis" in a way that is "not inconsistent with the Commission's rules." The ICAM surcharge fails that test on all three counts: it would not be imposed upon all intrastate carriers including U S West; it would not be equitable and nondiscriminatory; and it would be inconsistent with the Commission's regulations and policies implementing the 1996 Act.[14]

B. Preemption Authority For State Actions That Conflict With The Communications Act.

Wholly apart from its authority to preempt state and local laws that erect entry barriers, the Commission has the authority to preempt any state action that conflicts with the provisions of the Communications Act of 1934, as amended by the 1996 Act.[15] More broadly, the FCC may preempt state laws or regulations which "stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[16] Once the Commission determines that any particular state action conflicts with the terms of the

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[14] Despite U S West's self-serving statement that the ICAM surcharge is necessary for U S West to remain as the provider of last resort in its region (see U S West Petition at p.11), U S West does not make a serious showing that the ICAM surcharge is necessary to ensure service quality for its local exchange subscribers.

[15] E.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Federal Preemption of State and Local Laws Concerning Amateur Operator Use of Transceivers Capable of Reception Beyond Amateur Service Frequency Allocations, 8 FCC Rcd 6413, 6415 (1993).

[16] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); see also Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977).

Communications Act of 1934, it can and should preempt that action. The FCC need not undertake an analysis of whether the the interstate and intrastate aspects are severable in order to preempt state action that violates the terms of the Communications Act of 1934.[17] Because any state action approving or authorizing the ICAM surcharge would be an indisputable violation of the 1996 Act, the Commission is entitled to preempt such action.

C. Sections 4(i) and 251(d).

U S West argues that its alleged costs of complying with the 1996 Act cannot be recovered through rates established by state commissions pursuant to negotiations and arbitrations under Section 252.[18] To the extent that statement is correct (and CompTel challenges its accuracy above), it removes any possible statutory basis for suggesting that a state commission, rather than the FCC, has authority to adopt the ICAM surcharge. Sections 252(c)(2) and 252(d), which apply solely to negotiated or arbitrated agreements,[19] set forth the full extent of the authority of state commissions to establish rates to recover the "costs" associated with interconnection, network elements and local exchange resale under Section

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[17] In any event, as noted below, the interstate and intrastate aspects of interconnection and network elements are inherently inseverable. As the FCC found in the Interconnection Order (at ¶ 83), Congress established a new regulatory regime in Sections 251-252 whereby carriers obtain facilities and services from each other as co-carriers on a jurisdictionally unseparated basis.

[18] See U S West Petition at pp. 5, 11.

[19] The relative jurisdiction of the FCC and state commissions over the establishment of rates in negotiated or arbitrated agreements for the provision of interconnection, network elements and local exchange resale is currently on appeal before the U.S. Court of Appeals for the Eighth Circuit in Iowa Public Utilities Board v. FCC, Nos. 96-3321, et al. That issue is not relevant in this context since U S West is seeking authority to impose an ICAM surcharge to recover "costs" that are outside its arbitrated agreements with interconnecting carriers.

251. Therefore, Congress did not give state commissions the authority to adopt the ICAM surcharge proposed by U S West.

It is the FCC, not state commissions, who has the authority to adopt other regulations to implement Section 251 of the Act, including the establishment of any rate elements allegedly necessary to recover compliance costs, through its plenary rulemaking authority in Sections 4(i) and 251(d).[20] Section 4(i) provides that the FCC may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Further, Congress provided in Section 251(d) that "the Commission shall complete all actions necessary to establish regulations to implement the requirements of [Section 251]." The FCC exercised its rulemaking authority to adopt the minimum requirements necessary to implement the statute,[21] and it held that such requirements are "binding" upon the states.[22] While recognizing that Congress gave the states certain authority to establish rates in arbitrating and approving arbitrated agreements under Sections 251 and 252,[23] the FCC held that states may adopt additional regulations only if they are "pro-competitive" and "consistent with the Act and our rules."[24] As U S West's proposed ICAM surcharge is patently anti-competitive and contrary to the statutory pricing rules, state commissions lack jurisdiction under the 1996

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20 47 U.S.C. § 154(i) & 251(d).

21 Interconnection Order at ¶ 66.

22 Id. at ¶ 84.

23 Id. at ¶ 85.

24 Id. at ¶ 66.

Act to authorize such a surcharge outside of the negotiation and arbitration process under Section 252.

The FCC's exclusive authority over the recovery of costs beyond the scope of negotiated or arbitrated agreements is bolstered by the inseverability of the interstate and intrastate aspects of interconnection and network elements under Section 251. As the FCC held in the Interconnection Order, Congress created a regulatory regime that differs significantly from the pre-existing dual regulatory system in that the provisions governing interconnection and network elements apply "without distinction between interstate and intrastate services."[25] Because Congress did not give authority to the states to regulate rates for interconnection, network elements and local exchange resale outside of the context of negotiated or arbitrated agreements, and because the ICAM surcharge proposed by U S West would apply to its unseparated "costs," the FCC has authority to preempt states from authorizing or approving the ICAM surcharge consistent with traditional preemption doctrine as articulated in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986).

III. THE FCC SHOULD PREEMPT ANY STATE ACTION AUTHORIZING THE ICAM SURCHARGE AS INCONSISTENT WITH THE FCC'S PLENARY JURISDICTION OVER INTERSTATE ACCESS SERVICES

U S West asserts that its compliance with the 1996 Act involves "intrastate" activities,[26] which presumably explains why U S West is seeking authority to implement the ICAM surcharge from state commissions rather than the FCC. That statement would appear to be flatly incorrect on its face. As U S West concedes, the "network rearrangement costs"

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[25] Id. at ¶ 83.

[26] E.g., U S West Petition at p. 2 (seeking authority to impose the ICAM surcharge "for certain extraordinary interconnection costs incurred, and to be incurred, on an intrastate basis").

it desires to recoup include, among other things, "additional interoffice transport facilities and . . . capacity at the tandem."[27] However, those interoffice transport and tandem facilities will be used not only to route local traffic from interconnecting local carriers, but to route interstate access traffic for long distance carriers pursuant to Part 69 of the Commission's rules. Therefore, the ICAM surcharge represents a back-door way for U S West to recover embedded, historical costs associated with interstate access through an intrastate cost recovery mechanism.

The Commission should issue a declaratory ruling stating that it will preempt any state action authorizing ILECs to recover costs associated with providing interstate access services through an ICAM surcharge or other mechanism. Under the Supremacy Clause of Article VI of the U.S. Constitution, states may not regulate in an area of interstate commerce entrusted by Congress exclusively to a federal agency. Section 2(b) grants the Commission jurisdiction over "all interstate and foreign communications by wire or radio."[28] The Commission has held that, under that statutory framework,

> "the Commission has plenary and comprehensive jurisdiction over interstate and foreign communications, the regulation of which is entrusted to the Commission. The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority, Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state."[29]

Therefore, states lack jurisdiction to adopt any mechanism to recover the costs associated with providing interstate access services, thereby providing with Commission with an

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27 Id. at p. 3 & n.1.

28 47 U.S.C. § 152(b).

29 Operator Services Providers of America, 6 FCC Rcd 4475, 4476-77 & n.17 (1991).

alternative ground for preempting any state action approving or authorizing the ICAM surcharge proposed by U S West.

CONCLUSION

For the reasons stated in the Petition and herein, CompTel submits that the FCC should grant the requested declaratory ruling as expeditiously as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that I have served a copy of the foregoing "Comments of the Competitive Telecommunications Association" on this 3rd day of April, 1997, upon the following parties via U.S. mail, first class, postage prepaid:

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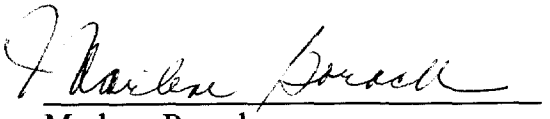

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